Supreme Court, U.S.
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No. 96-235

In The

Supreme Court of the United States

October Term, 1996

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Petitioner,

v.

STEPHEN B. MACFARLANE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO AMICUS BRIEF OF THE UNITED STATES

DANIEL E. LUNGREN,
Attorney General of the State of California
TIMOTHY G. LADDISH,
Assistant Attorney General
CAROL H. REHM, JR.
Supervising Deputy Attorney General
ANTHONY SGHERZI,
Deputy Attorney General
(*Counsel of Record*)
300 South Spring Street
Los Angeles, California 90013
(213) 897-2488

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

REPLY BRIEF OF PETITIONER IN RESPONSE TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

Amicus curiae, United States, fully agrees with petitioner and the 24 amici states that the burden of proof issue presented in the petition is an important and recurring issue on which there is a direct conflict in the circuits. The United States also fully agrees with petitioner and the amici states that the Ninth Circuit erred in holding against petitioner on this issue. However, the Solicitor General contends that this case is not an appropriate vehicle for resolving this issue. This contention is based upon the misconception that there was no "final order" before the Ninth Circuit when that court accepted the case.

At pages 12-13 of his brief the Solicitor General contends that "[a] district court order that denies a motion for summary judgment on the ground that material issues of fact remain in controversy is not a 'final' order from which an appeal may be taken. . . . " The petitioner is in agreement with this statement. What the Solicitor General fails to recognize, and what is clearly expressed in the district court's appellate decision, is that there were *two separate rulings* being reviewed by the district court: the ruling granting, based on findings of fact and conclusions of law, the motion for denial of the claims, and the ruling granting the motion for summary judgment. (Pet.App. 12.) The district court's affirmance of the bankruptcy court's ruling on the debtor's motion for denial of the claim disposed of the case on the merits. (Pet.App. 12.)

The district court's judgment specifically provides that, " . . . the Bankruptcy Court's findings of fact and

conclusions of law on the motion for denial of claim, Bankruptcy Docket #181, are affirmed *and* the Bankruptcy Court's grant of summary judgment denying the Board's claim, Bankruptcy Docket #235 is reversed. . . . " (Pet.App. 12, emphasis added.) This shows that the district court made separate rulings with respect to *both* matters: the denial of the claim, based upon the findings of fact and conclusions of law, and the motion for summary judgment on the claim.[1] The district court's affirmance of the findings of fact and conclusions of law constituted a "final order" which provided the Ninth Circuit with proper appellate jurisdiction.

Under the circumstances, this case is therefore properly treated on appeal the same as one that is submitted for a bench trial on a stipulated record. (*See, Ojai Unified School Dist. v. Jackson*, 4 F.3d 1467, 1472 (9th Cir. 1993); *Vetter v. Frosch*, 599 F.2d 630, 632 (5th Cir. 1979).)

The petitioner agrees that the district court's opinion contains an internal inconsistency: having affirmed the bankruptcy court's denial of petitioner's claim, on the basis of findings of fact and conclusions of law, the district court should have noted that the summary judgment motion was moot. *See, Huval v. Offshore Pipelines, Inc.*, 86 F.3d 454, 458 (5th Cir. 1996).

The record does not support the United States' assertion that "[t]he posture of the case at the conclusion of

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[1] The memorandum decision of the district court specifically held that, ". . . . this court must consider this matter as both an appeal from a summary judgment and an appeal from the bankruptcy court's decision on the merits of the Board's Proof of Claim." (Pet.App. 18.)

these proceedings in the district court was thus simply that a motion for summary judgment had been denied." (U.S. Br. p. 12.) The district court distinctly affirmed the bankruptcy court's final ruling on the merits (based upon findings of fact and conclusions of law) on the debtor's motion for denial of claim. In reaching separate findings of fact and conclusions of law regarding the denial of claim motion, the bankruptcy court was acting outside the context of the summary judgment motion. The district court judgment separately addressed the merits of the bankruptcy court's action on the denial of claim motion; therefore that judgment constituted a final order subject to appellate review.

While there is language in the Ninth Circuit's opinion suggesting that " . . . further proceedings in bankruptcy court are contemplated" (Pet.App. 6), there is nothing in the record to indicate that the district court contemplated any such proceeding.[2] In fact the Ninth Circuit opinion goes on to provide that, "[t]he judgment of the district court is REVERSED and the case REMANDED to the bankruptcy court for entry of judgment in favor of Macfarlane." (Pet.App. 11.)

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[2] The district court's judgment contains absolutely no provision for further factual determination proceedings. Findings of fact and conclusions of law were already made and entered by the bankruptcy court. (Pet.App. 37-42.) The Board's claim was clearly denied. The fact that, without petitioner's appeal to the Ninth Circuit, the bankruptcy court might have entered judgment to carry out the district court's appellate decision does not change the district court's order into a non-final order.

This Court clearly is presented with an appropriate vehicle with which to resolve the "burden of proof" issue. Had the petitioner failed to file its appeal when it did in the Ninth Circuit, petitioner would have lost the opportunity for appellate review of the adverse holding on the motion denying its claim – a final order disposing of the case on the merits. Since, under the district court's holding, there were no additional findings of fact or conclusions of law which needed to be made, remand to the bankruptcy court for further factual determination proceedings would have served no purpose.

This Court is presented with a single legal issue: should the burden of proving entitlement to a bad debt deduction be shifted to the government when a tax claim is litigated in the bankruptcy court? The Ninth Circuit had jurisdiction to consider petitioner's appeal of the district court's final order on the merits of this issue. The Ninth Circuit's erroneous holding on this important and recurring issue presented by the petition is properly before this Court for review.

For the reasons given above and in the petition for writ of certiorari it is respectfully submitted that the petition should be granted to resolve an issue which the United States recognizes is (1) important, (2) recurring,

(3) in conflict within the circuits, and (4) erroneously decided in the Ninth Circuit's decision.

Respectfully submitted,

DANIEL E. LUNGREN,
Attorney General of the
State of California
TIMOTHY G. LADDISH,
Assistant Attorney General
CAROL H. REHM, JR.
Supervising Deputy Attorney
General
ANTHONY SGHERZI,
Deputy Attorney General
(Counsel of Record)
300 South Spring Street
Los Angeles, California 90013
(213) 897-2488

Attorneys for Petitioner